Supreme Court, U.S.
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No. ____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1996

TERRY MORRIS, et al.,

Petitioners,

v.

JOHN L. WRIGHT, et al.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

ON APRIL 26, 1996, THE PRISON LITIGATION REFORM ACT OF 1996 (THE "PLRA" OR THE "ACT") WENT INTO EFFECT. AMONG OTHER THINGS, THE ACT ESTABLISHES AN ADMINISTRATIVE EXHAUSTION REQUIREMENT FOR PRISONER CIVIL RIGHTS CASES. *SEE* 42 U.S.C. § 1997e(a). TWO QUESTIONS ARISE UNDER THE ACT CONCERNING CASES PENDING ON THE DATE OF ITS ENACTMENT:

I

WHETHER CONGRESS EXPLICITLY PROVIDED THAT THE STATE-EXHAUSTION REQUIREMENTS ESTABLISHED BY THE PLRA APPLY ONLY TO CLAIMS FILED AFTER ITS EFFECTIVE DATE?

II

WHETHER, IN THE ABSENCE OF EXPLICIT GUIDANCE FROM CONGRESS, THE DEFAULT RULES OF *LANDGRAF V. U.S.I. FILM PRODUCTS*, 511 U.S. 244 (1994), CONFIRM THAT THE PLRA'S STATE-EXHAUSTION REQUIREMENTS APPLY TO CASES PENDING ON THE DATE OF ENACTMENT?

LIST OF PARTIES

Petitioners are state officials from Ohio, Michigan, Kentucky and Tennessee who were the Appellees in *Wright v. Morris*, Case No. 95-4160; *Birdo v. Berry,* Case No. 95-6366; *Corley v. Bennett*, Case No. 95-6451 and *Thaddeus-X v. Blatter*, Case No. 95-1837 in the Sixth Circuit. They are as follows:

Wright
Terry L. Morris
William B. Carmich
Susann Dunn
Roger T. Overberg
Nicu J. Sandborn
Don Lubbering
Nancy Howard
Tracy Palmorous
Chris Gaven

Berry
Steve Berry

Corley
Debbie Burnett
Flora Holland

Thaddeus-X
James Karazim
Allen Blatter
Terry Bildner
Stace Graham
Don Sparks

Respondents are the Appellants in the *Wright*, *Birdo*, *Corley* and *Thaddeus-X* cases and are state prisoners in Ohio, Michigan, Kentucky and Tennessee. They are:

John L. Wright
Tanaka Lee Birdo
Edward Corley
Thaddeus X
Ernest Bell, Jr.

In addition to the above Petitioners and Respondents, the following private citizens were Appellees in *Wright* but took no part in the consolidated portion of that appeal and are not parties to this petition:

Donald Roller
Larry Pavey

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OPINIONS AND JUDGMENTS BELOW

The decision of the United States Court of Appeals for the Sixth Circuit, entered on April 11, 1997, is reported. *See Wright v. Morris, et al.*, ___ F.3d___; A-1. The district court decisions, which the Sixth Circuit consolidated in this appeal, are unreported. *See Wright v. Morris,* Case No. C1-93-00149 (S.D. Ohio, Sept. 29, 1995), *aff'd,* Case No. 95-4160 (6th Cir. Mar 11, 1997); *Corley v. Burnett*, Case No. 3-95-0974 (M.D. Tenn., Oct. 11, 1995), *aff'd,* Case No. 95-6451 (6th Cir. April 11, 1995); *Birdo v. Berry*, Case No. 94-CV-74621-DT (W.D. Ky. Sept. 19, 1995), *aff'd*, Case No. 94-00645 (6th Cir. 1997); *Thaddeus-X v. Blake*, Case No. 94-CV-74621-DT, (E.D. Mich., July 11, 1995), *rev'd,* ____ F.3d ____ (6th Cir. April 11, 1997).

JURISDICTIONAL STATEMENT

The opinion of the United States Court of Appeals for the Sixth Circuit concerning these consolidated cases was entered on April 11, 1997. (A-1). Jurisdiction exists under 28 U.S.C. § 1254.

STATUTORY PROVISION INVOLVED

> APPLICABILITY OF ADMINISTRATIVE REMEDIES--No action shall be brought with respect to prison conditions under section 1979 of the Revised Statutes of the United States (42 U.S.C. § 1983), or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

42 U.S.C. § 1997e(a).

STATEMENT OF THE CASE

In the decision below, the court of appeals consolidated four prisoner civil rights appeals originating in the States covered by the Sixth Circuit -- Kentucky, Michigan, Ohio and Tennessee. Each case originally sought injunctive and monetary relief arising from the conditions of the inmate's confinement. Each case was filed before April 25, 1996. Each case was dismissed at the district court level on substantive grounds. And each case was timely appealed to the Sixth Circuit.

On April 25, 1996, after each of the four cases had been briefed on appeal but before they had been decided, the Prison Litigation Reform Act of 1996, P.L. 104-134 § 801; 110 Stat. 1321 (the "PLRA" or the "Act") went into effect. Among other things, the PLRA amended 42 U.S.C. § 1997e(a), requiring prisoners to exhaust all administrative remedies under State law before seeking relief in federal court concerning the conditions of their confinement.

Soon after the PLRA went into effect, the Sixth Circuit consolidated the four cases for additional briefing concerning the question of whether the Act applied to these appeals. After the court appointed counsel for each of the respondents, the parties submitted additional briefs on the issue and presented oral argument on December 5, 1996. Neither the consolidated briefing nor the oral argument addressed the merits of the underlying appeals.

On April 11, 1997, the Sixth Circuit (Engel, Merritt (dissent), *Moore*) held that the PLRA amendments to § 1997e(a) do not apply to cases pending on the date of their enactment. Claiming that the language of the amendment ("no action shall be brought") textually limited the Act to prospective application, the Court initially concluded that

there was no need to resort to the default rules of *Landgraf v. U.S.I. Film Products*, 511 U.S. 244 (1994). In the alternative, the Court concluded that even under the default rules of *Landgraf*, the amendment applied only to prisoner claims filed after April 24, 1996, when the PLRA went into effect. Judge Merritt dissented, finding that § 1997e(a) limits the jurisdiction of the federal courts and therefore applies to pending cases. He also relied on the fact that § 1997e(a) regulated procedure rather than primary conduct and that it would result in higher quality, more efficient resolution of prisoners' claims. (A-19 *et seq.*).

On the same day it issued this decision and in view of its interpretation of the PLRA, the court separately issued four opinions addressing the merits of the appeals. In unreported opinions, the court affirmed the dismissal of the Kentucky, Ohio and Tennessee claims. In a separate published opinion, the court reversed the dismissal of the Michigan case. Judgment was entered on the same day in each case. These separate decisions are not being appealed at this time.

On April 29, 1997, petitioners filed a motion to stay the Sixth Circuit's mandate in accordance with Fed. R. App. P. 41(b). To petitioners' knowledge, that motion has not yet been addressed.

REASONS FOR GRANTING THE WRIT

The decision below presents two federal issues of great importance: Did Congress explicitly limit application of the PLRA's state-exhaustion requirements to cases filed after the law went into effect? And, in the event Congress did not provide explicit guidance on this issue, do the default rules of *Langraf v. U.S.I. Film Products*, 511 U.S. 244 (1994), confirm that these state-exhaustion requirements

apply to pending cases? As both questions implicate a growing conflict of authority among the lower courts, involve exceedingly important federal questions, and were incorrectly decided below, we respectfully submit that the writ should be granted.

I. CONGRESS DID NOT EXPLICITLY LIMIT APPLICATION OF THE PLRA'S STATE-EXHAUSTION REQUIREMENTS TO CASES FILED AFTER ITS EFFECTIVE DATE.

A. The Decision Below Exacerbates A Growing Conflict Among The Circuits.

In holding that Congress explicitly limited application of the PLRA's state-exhaustion requirement to prospective application, the court relied on language in the amendment providing that "no action shall be brought" until a prisoner has exhausted his administrative remedies. 42 U.S.C. § 1997e(a). In the court's view, this language showed that Congress textually restricted the amendments to cases filed after the PLRA's effective date -- April 25, 1996. Whether accurate or not, that conclusion sharpens a conflict among the circuits.

On the one hand, the Sixth Circuit was not alone in reaching this conclusion. The result parallels a decision of the Seventh Circuit, in which the court held that the similarly-worded provisions of 28 U.S.C. § 1915(g) are textually limited to cases "brought" after the PLRA's enactment. *Abdul-Madood v. Hatman*, 91 F.3d 1023, 1025 (7th Cir. 1996). On the other hand, the approach followed by the Sixth and Seventh Circuits has not been followed in decisions from the Fifth, Eighth and Tenth Circuits. In

addressing similar questions under the PLRA -- whether Congress explicitly made the Act applicable only to future cases -- these circuits did not find dispositive similar textual direction from Congress. The decisions thus each held that use of the word "bring" (or its variations) did not foreclose application of the PLRA to pending cases. *See Green v. Nottingham*, 90 F.3d 415, 418 (10th Cir. 1996) (construing 28 U.S.C. § 1915(g) which provides that "in no event *shall* a prisoner *bring* a civil action" after previously abusing *in forma pauperis* status) (emphasis added); *Adepegba v. Hammons*, 103 F.3d 383, 385 (5th Cir. 1996) (same); *Strickland v. Rankin County Correctional* Facility, 105 F.3d 972, 973 (5th Cir. 1997) (construing 28 U.S.C. § 1915(a)(2) which provides that "a prisoner seeking *to bring* a civil action or appeal" shall comply with certain procedures) (emphasis added); *Jensen v. Clarke*, 94 F.3d 1191, 1202 (8th Cir. 1996) (construing 42 U.S.C. § 1997e(d) which limits attorney fees "in any action *brought* by a prisoner") (emphasis added).

Several district courts have reached conclusions similar to the Fifth, Eighth and Tenth Circuits. *See Lyons v. Vandekrol*, 940 F. Supp. 1433, 1435 (C.D. Iowa 1996) (construing 28 U.S.C. § 1915(g)); *Harris v. Lord*, 1997 U.S. Dist. Lexis 2667, slip op. at *4 (S.D. N.Y. March 7, 1997) (construing 42 U.S.C. § 1997e(e) which provides that "no federal civil action may be brought" without a prior showing of physical injury); *Thomas v. Hill*, 1997 U.S. Dist. Lexis 5448, slip op. at *12 (N.D. Ind. April 4, 1997) (same).

The Sixth Circuit's decision also diverges from holdings of the Second, Fifth and Ninth Circuits to the effect that the PLRA as a whole does not contain an express statement concerning its temporal scope. *See Coveno v. Reopel*, 89 F.3d 105, 106 (2d Cir. 1996), *cert. denied,* 117 S. Ct. 1265 (1997); *Ayo v. Bathey*, 106 F.3d 98, 100 (5th

Cir. 1997); *Marks v. Slocom*, 98 F.3d 494, 495-496 (9th Cir. 1996). Finally, the Sixth Circuit's decision conflicts with the Ninth Circuit's practice of remanding cases predating the PLRA for evaluation under § 1997e(a). *See St. Hilaire v. Arizona*, 1996 U.S. App. Lexis 16778, slip op. at *7 (9th Cir. June 19, 1996); *Berry v. Gomez*, 1997 U.S. App. Lexis 3234, slip op. at *7 (9th Cir. Feb. 20, 1997).

Under these circumstances, the first question presented raises an issue that has divided the lower courts on two levels: (1) Does the "no action shall be brought" language of 42 U.S.C. 1997e(a) specifically limit the provision to future cases? (2) Do restrictions on "bringing" causes of action, as used throughout the PLRA, generally provide explicit congressional direction that the affected provisions apply only to future cases? Both issues have been resolved differently by the lower courts. The disagreement warrants review.

B. The Question Presented Has Great National Importance.

The temporal reach of the PLRA also presents a matter of great significance to the States, most notably because it affects a staggering number of pending cases. According to the Administrative Office of the Federal Courts, approximately 31,000 prisoner civil rights cases were pending shortly before the enactment of the PLRA. *Federal Judicial Caseload Statistics* (Administrative Office of the United States Courts, March 31, 1996). Because the "no action shall be filed" language of § 1997e(a) parallels in relevant respects other provisions of the PLRA, the decision below has the potential to affect each of these cases. But even limiting the impact of the decision to the state-exhaustion requirements of 1997e(a) and to cases within the Sixth Circuit alone, the impact is significant. As Judge

Merritt noted in his dissent below, application of the state-exhaustion requirements within the Sixth Circuit will affect roughly 500 appeals. (A-19).

These numbers have more than mere statistical import. The problem addressed by the PLRA -- excessive prisoner lawsuits -- has placed unique burdens on the States' administration of their prison systems. As the drafters of the PLRA well knew, inmate litigation has diverted staff from their immediate responsibilities, undermined morale and staff effectiveness, hindered discipline and increased State prison costs. *See generally* A. Champagne and K. Haas, *The Impact of Johnson v. Avery on Prison Administration*, 43 Tenn. L. Rev. 275, 291-295 (1976); K. Engel and S. Rothman, *The Paradox of Prison Reform: Rehabilitation, Reform and Violence*, 7 Harvard Journal of Law and Public Policy 413, 431-433 (1984); J. Marquat and B. Crouch, *Judicial Reform and Prisoner Control: The Impact of Ruiz v. Estelle on a Texas Penitentiary*, 19 Law and Society Rev. 557, 579-581 (1985); R. Doumar, *Prisoner Cases: Feeding the Monster in the Judicial Closet*, 14 St. Louis U. Pub. L. Rev. 21, 27 (1994); *see also* C. Hall, *Ring Used Religion to Sneak Drugs into Lorton*, The Washington Post, Sept. 27, 1996, A-1 (prison staff failed to take action to stop drug smuggling, prostitution, and the production of pornography because prisoners "routinely intimidated guards by threatening to sue them...'we had correctional officials who were afraid to do their jobs'").

As this Court has recognized, these concerns cannot be lightly dismissed. "It is difficult to imagine," the Court has held, "an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations, and procedures, than the administration of its prisons." *Preiser v. Rodriguez*, 411 U.S. 475, 491-92 (1973). Application of the PLRA to pending cases, we

submit, will directly advance the law's goals of addressing these concerns. The importance of the question presented, in short, independently supports the writ.

C. The Sixth Circuit Erred In Holding That Congress Expressly Limited The PLRA's State-Exhaustion Requirements To Future Cases.

In addition to implicating a sharp split in the lower courts and involving an important federal question, the decision below also was incorrectly decided. In holding that § 1997e(a) "expressly prescribed the statute's proper reach" under *Landgraf v. U.S.I Film Prods.*, 511 U.S. 244, 280 (1994), the Sixth Circuit placed undue weight on the procedural language of the provision stating that "no action shall be brought" unless the inmate has exhausted State administrative procedures. This error also supports the petition.

In 1996, Congress amended 42 U.S.C. 1997e to read:

> no action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

42 U.S.C. 1997e(a). The appellate court concluded that this language does not apply to pending cases for two reasons. First, "because 1997e(a) governs only the bringing of actions, it does not affect pending cases." (A-7). Second, because another section of the PLRA explicitly makes the

Act applicable to pending cases, the absence of such language purportedly supports the court's interpretation. (A-7-8).

Neither reason supports the conclusion that Congress "has expressly prescribed the statute's proper reach," as required by *Langraf*. 511 U.S. at 280. As an initial matter, this provision of the PLRA lacks the most express mechanism for providing textual guidance -- an effective date provision. Nowhere does the statute explicitly address whether the Act applies to pending cases. The use of an effective date provision elsewhere in the PLRA makes this omission all the more glaring. Thus, far from reenforcing this portion of the court's analysis, Congress's decision to create an effective date provision in another section of the PLRA undermines the view that Congress expressly addressed the issue here.

Perhaps more importantly, the "shall be brought" language contains a fundamental ambiguity with respect to legislation of this sort. While general limitations on the "bringing" of actions may imply that the provision is only forward looking, that is not always true. The uncertainty stems from the nature of any law creating procedural requirements that must be met in order to obtain relief. It is simply easier as a matter of legislative drafting to say that the action may not be "brought," "instituted" or "filed" until certain procedural requirements have been met. Indeed, most limitations on federal-court review of State prisoner actions are written in precisely this way. But resort to such drafting crutches by no means confirms that the legislature limited application of the law to cases filed after its effective date. It is just as fair to conclude that the legislature adhered to the normal customs for drafting laws about the bringing of a lawsuit, and simply failed expressly to decide whether the new rules applied to pending cases -- a conclusion that makes

particular sense with respect to exhaustion requirements which (unlike statutes of limitations) can be met throughout the litigation.

Nor is this approach foreign to the case law. That is why the Court has applied new laws concerning the "institution" of a proceeding to cases pending on the date of enactment. *See United States v. Alabama*, 362 U.S. 602, 604 n. 3 (1960). That is why the Court has applied new attorney fee provisions predicated "upon the entry of a final order" to cases in which the final order predated the amendment by several years. *See Bradley v. Richmond School Board*, 416 U.S. 696, 709 n.12 (1974). And that is why the Court has applied new administrative notice requirements to cases in which the notice had been given (and the case commenced) more than a year before the amendment. *See Thorpe v. Housing Authority of Durham*, 393 U.S. 268, 273 n.8 (1969). Likewise, the courts of appeal have also applied statutes conditioned upon the occurrence of specific events to cases premised on pre-enactment events. *See Bedoni v. Navajo-Hopi Indian Relocation Commission*, 878 F.2d 1119, 1120 (9th Cir. 1989).

In the final analysis, Congress's use of "shall be brought" language simply does not provide the requisite clear direction needed in this area. Much as in *Landgraf* itself, moreover, "purely prospective application" of the PLRA

> would prolong the life of a remedial scheme, and of judicial constructions of civil rights statutes, that Congress obviously found wanting. Given the high stakes of the retroactivity question, the broad coverage of the statute, and the prominent and specific retroactivity provisions in the 1990 bill, it

> would be surprising for Congress to have chosen to resolve that question through [a less than clear statement].

511 U.S. at 259. In reaching a contrary conclusion, the Sixth Circuit committed reversible error.

II. THE DEFAULT RULES SET FORTH IN *LANDGRAF V. U.S.I. FILM PRODUCTS*, 511 U.S. 244 (1994), CONFIRM THAT THE PLRA'S STATE-EXHAUSTION REQUIREMENTS APPLY TO PENDING CASES.

In addition to concluding that Congress explicitly provided that § 1997e(a) applies only to future cases, the appellate court alternatively concluded that the provision applies only to future cases under the default rules set forth in *Landgraf v. U.S.I. Film Products*, 511 U.S. 244 (1994). This conclusion, too, is mistaken and merits review.

A. The Sixth Circuit's Analysis Fails To Follow *Landgraf* And Other Decisions Of This Court.

First, *Landgraf* makes clear that the "consistent practice of the courts" is to apply changes to jurisdictional grants to pending cases because they 'speak to the power of the court rather than to the rights or obligations of the parties.'" 511 U.S. at 274 (quoting *Republic Nat. Bank of Miami v. United* States, 506 U.S. 80, 100 (1992) (Thomas, J., concurring)). While the court acknowledged this safe harbor, (A-10-13), it found it inapplicable here. The court concluded that the provision merely "addresses a party's right to bring suit in court and does not speak in terms of jurisdiction or the power of the court: it is merely an

exhaustion requirement." (A-11). But just because a provision sets up an exhaustion requirement does not exclude the possibility that it also operates as a jurisdictional bar.

In *Weinberger v. Salfi*, 422 U.S. 749 (1975), the Court considered a statute providing that "no action ...shall be brought under [a federal statute]" unless the claimant first exhausted his administrative remedies. In doing so, *Salfi* determined that the "sweeping and direct" language of the statute, together with its express reference to a jurisdictional provision, 28 U.S.C. 1331, made the law jurisdictional in nature. *Id.* at 756-759. Section 1997e(a) utilizes virtually identical language, language as "sweeping and direct" as the provision in *Salfi*, and it too references jurisdictional provisions by prohibiting actions under "any other Federal law." 42 U.S.C. 1997e(a). Under these circumstances, the jurisdictional nature of section 1997e(a) should be dispositive here. *See also McNeil v. United States*, 508 U.S. 106 (1993) (reaching a similar result in construing the legally indistinguishable provisions of 28 U.S.C. § 2675(a)).

Second, the Sixth Circuit overlooked the procedural nature of § 1997e(a), which itself establishes a *Landgraf* safe harbor for concluding that a change in law applies to pending cases. Courts generally apply procedural changes to existing cases, *Landgraf* teaches, because the parties have a diminished reliance interest in statutes that regulate how disputed primary conduct comes before the courts rather than regulating the propriety of the underlying conduct itself. *Landgraf*, 511 U.S. at 275. Section 1997e(a) in no way establishes new rules concerning the underlying conduct of prisoners and prison staff; it simply makes sure that the prisoners initially seek all available relief under State law before going to federal court. Nor can prisoners establish any plausible reliance interest in prior law, which itself contained an administrative exhaustion requirement, just one

that did not apply in all cases. *See* 42 U.S. 1997e(a)(1) (1995); *Patsy v. Board of Regents*, 457 U.S. 496, 502-12 (1982); *Arvie v. Stalder*, 53 F.3d 702 (5th Cir. 1995). *See also Bradley v. Richmond School Board*, 416 U.S. 696 (1974).

Finally, the Sixth Circuit undervalued the importance of the injunctive nature of the relief requested. Again, under *Landgraf*, laws changing the availability of prospective relief generally apply to pending cases. *Landgraf*, 511 U.S. at 273-274. Because the requested injunctive relief affects the "propriety of prospective relief," *id.* at 273, section 1997e(a) should govern these claims. *See also Cort v. Ash*, 422 U.S. 66, 71, 74 (1975). The lower court's contrary conclusion merits review.

B. The Sixth Circuit's Analysis Conflicts With Decisions From Other Circuits.

The Sixth Circuit's analysis also diverges from decisions of other circuits construing the PLRA. As an initial matter, the Sixth Circuit's decision conflicts with the practice of the Ninth Circuit in applying § 1997e(a). To date, the Ninth Circuit has remanded cases predating passage of § 1997e(a) for consideration under its exhaustion requirements. *See Berry v. Gomez*, 1997 U.S. App. Lexis 3234, slip op. at *7 (9th Cir. Feb. 20, 1997); *St. Hilaire v. Arizona*, 1996 U.S. App. Lexis 16778, slip op. at *7 (9th Cir. June 19, 1996).

In addition, the Sixth Circuit's rejection of one of the most compelling arguments for current application of the law, its jurisdictional nature, is at odds with a number of decisions holding that § 1997e(a) is indeed jurisdictional. *See Bell v. Calderon*, 1997 U.S. Dist. Lexis 4373 (N.D. Cal.

April 3, 1997); *Eakins v. Madrid*, 1996 U.S. Dist. Lexis 19150 (N.D. Cal. Dec. 24, 1996). *See also Hernandez v. Steward*, 1996 U.S. Dist. Lexis 18076 (D. Kan. Nov. 27, 1996).

The decision below also differs from the analyses of several other courts construing provisions of the PLRA that, like § 1997e(a), alter the procedure for bringing inmate claims without altering the substantive grounds for resolving those claims. Thus far, three other circuits have analyzed the appropriateness of applying such provisions to pending cases under *Landgraf* and in doing so have each held that the procedural nature of the amendments makes them applicable to pending cases. *Coveno v. Reopel*, 89 F.3d 105 (2d Cir. 1996), *cert. denied*, 117 S. Ct. 1265 (1997) (new filing fee requirements of 28 U.S.C. § 1915(a) and (b)); *Strickland v. Rankin County Correctional Facility*, 105 F.3d 972 (5th Cir. 1997) (same); *Ayo v. Bathey*, 106 F.3d 98 (5th Cir. 1997) (same); *Adepegba v. Hammons*, 103 F.3d 383 (5th Cir. 1996) (limitations in 28 U.S.C. § 1915 (g) on availability of *in forma pauperis* status to prisoners who have abused it in the past); *Marks v. Slocom*, 98 F.3d 494 (9th Cir. 1996) (screening requirements of 28 U.S.C. § 1915(e)). Section 1997e(a) similarly regulates the procedure inmates must follow in bringing claims in federal court without altering the substantive grounds for resolving those claims. The Sixth Circuit's analysis sharply conflicts with these other decisions.

Third, the Sixth Circuit's conclusions regarding the non-jurisdictional nature of § 1997e(a), a crucial consideration under *Landgraf*, is at odds with decisions from every other circuit that has addressed the retroactivity of a very similar statute. Section 1997e(a) is legally indistinguishable in language and purpose from the exhaustion requirement of 28 U.S.C. § 2675(a). That provision states: "An action shall not be initiated against the

United States" until the claimant has exhausted administrative remedies. *See McNeil*, 508 U.S. at 111. Yet every other circuit has held that this similarly-worded provision is jurisdictional. *See Bowden v. United States*, 106 F.3d 433 (D. C. Cir. 1977); *Cotto v. United States*, 993 F.2d 274, 280 (1st Cir. 1993); *Robinson v. Overseas Military Sales Corp.*, 21 F.3d 502, 510 (2d Cir. 1994); *Liveia v. First National State Bank*, 879 F.2d 1186, 1194 (3d Cir. 1989) *cert. denied* 493 U.S. 937 (1989); *Ahmed v. United States*, 30 F.3d 514, 516 (4th Cir. 1994); *Price v. United States*, 81 F.3d 520 (5th Cir. 1996); *Ezekial v. Michel*, 66 F.3d 894 (7th Cir. 1995); *Wilson v. Drake*, 87 F.3d 1073, 1075-1076 (9th Cir. 1996) *cert. denied* 65 U.S. 3647 (1997); *Kendall v. Watkins*, 998 F.2d 848, 852 (10th Cir. 1993) *cert. denied* 510 U.S. 1120 (1994).

C. The Question Presented Is One Of Great Federal Importance.

As shown in discussing the first question presented by this petition, the problem addressed by the PLRA -- excessive prisoner lawsuits -- causes notable disruptions to the States' prisons, to prison administrators and to the courts. Because the decision below greatly weakens the most comprehensive response to this problem, it has grave consequences to the States. This conclusion is no less true for the second question presented than it is for the first. Indeed, the Court's decision to grant certiorari in *Lindh v. Murphy*, No. 96-6298, would seem directly to support granting the writ here.

CONCLUSION

For the foregoing reasons, Petitioners respectfully submit that the Court should grant the writ in this case.

Respectfully submitted,

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Date: May 7, 1997

Nos. 95-4160/6366/6451/1837

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 95-4160

JOHN L. WRIGHT,	:	
Plaintiff-Appellant,	:	
	:	
v.	:	ON APPEAL from
	:	The United States
TERRY L. MORRIS, *et al.*,	:	District Court for
Defendants-Appellees.	:	the Southern
	:	District of Ohio

No. 95-6366

TANAKA LEE BIRDO,	:	
Plaintiff-Appellant,	:	
	:	
v.	:	ON APPEAL from
	:	The United States
STEVE BERRY, *et al.*,	:	District Court for
Defendants-Appellees.	:	the Western
	:	District of
	:	Kentucky

No. 95-6451

EDWARD R. CORLEY, *Plaintiff-Appellant*,	:	
v.	:	ON APPEAL from
	:	The United States
DEBBIE BURNETT, *et al.*, *Defendants-Appellees.*	:	District Court for the Middle District of Tennessee

No. 95-1837

THADDEUS-X AND EARNEST BELL, JR., *Plaintiffs-Appellants*,	:	
v.	:	ON APPEAL from
	:	The United States
BLATTER, *et al.*, *Defendants-Appellees.*	:	District Court for the Eastern District of Michigan

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Decided and Filed April 11, 1997

Before: ENGEL, MERRITT, and MOORE, Circuit Judges.

MOORE, J., delivered the opinion of the court, in which ENGEL, J., joined. MERRITT, J. (pp. 18-23), delivered a separate dissenting opinion.

KAREN NELSON MOORE, Circuit Judge. These four consolidated cases present the question of whether the administrative exhaustion requirement of the Prison Litigation Reform Act of 1996,[1] Title VIII of the Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104, 134, 110 Stat. 1321, applies to prisoner civil rights cases that were pending before this court when the Act took affect. For the reasons discussed below, we hold that the administrative exhaustion requirement does not apply to appeals already pending on the enactment date.

I. FACTS AND PROCEDURAL HISTORY

We address the merits of plaintiffs' claims in separate opinions; it is therefore sufficient for the purposes of this opinion to note that each of the four plaintiffs is an inmate in one of the four state prison systems in this circuit[2] who filed a pro se suit in the appropriate United States district court under 42 U.S.C. § 1983 challenging the conditions of his confinement. None of the inmates contends that he has exhausted all of the administrative remedies which were available at the time of the alleged violations.[3] The cases

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[1]Although the Act states that it "may be cited as the 'Prison Litigation Reform Act of 1995,'" it was passed by Congress and signed by the President in 1996. *See* Omnibus Consolidated Rescissions and Appropriations Act of 1996 § 801.

[2]Plaintiff Wright is incarcerated in Ohio, Plaintiff Birdo in Kentucky, Plaintiff Corley in Tennessee, and Plaintiffs Bell and X in Michigan.

[3]Plaintiff Corley filed an administrative complaint but did not appeal the denial of that complaint to the highest possible administrative level. He argues that, because the time for this final administrative appeal is long past, there is no longer any administrative process available to him and he has therefore met

were filed between 1993 and 1995 and were dismissed by the district courts in 1995. The plaintiffs filed timely appeals.

While these appeals were pending in this court, Congress passed the Prison Litigation Reform Act of 1996 [hereinafter "PLRA" or "Act"], which requires inter alia that inmates exhaust "such administrative remedies as are available" before filing suit challenging prison conditions under § 1983. PLRA § 803(d) (amending 42 U.S.C. § 1997e(a)). The new law was signed by the President on April 26, 1996, and went into affect that same day. *See Lyons v. Ohio Adult Parole Auth.*, 105 F.3d 1063, 1066 (6th Cir. 1997) (statutes become affective when enacted absent indication to contrary). The clerk of this court chose one case from each state within this circuit and asked attorneys who were involved with prisoner civil rights litigation and attorneys for the four states to submit briefs on the issue of whether the new administrative exhaustion provision applies to these pending cases.[4]

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the exhaustion requirement. Appellant's Br. In No. 95-6451 at 13. In light of our holding in this case, we need not address this argument. It is clear, however, that in the usual case in the future, where the alleged violations occurred after the PLRA's enactment, and inmates have both notice that exhaustion is required and a reasonable opportunity to file complaints, it would be contrary to Congress's intent in enacting the PLRA to allow inmates to bypass the exhaustion requirement by declining to file administrative complaints and then claiming that administrative remedies are time-barred and thus not then available.

[4]The briefing letter stated the question as follows: "In the absence of an expressed affective date, does this legislation [the amendment to 42 U.S.C. 1997e(a)] apply retroactively to litigation pending at the date of its enactment, April. 26, 1996." The clerk also asked the attorneys to discuss whether the new law requires prisoners to appeal in state court a denial of administrative

II. JURISDICTION AND STANDARD OF REVIEW

We have jurisdiction over these § 1983 cases under 28 U.S.C. §§ 1331, 1291. We examine de novo the purely legal questions of whether a new statute applies to pending cases.[5] *Lyons*, 105 F.3d at 1065-66.

III. DISCUSSION

Before this year, prisoners challenging the conditions of their confinement under 42 U.S.C. § 1983 were not, as a rule, required to exhaust administrative remedies before filing suit. Although 42 U.S.C. § 1997e allowed district courts to "continue such case[s] for a period of not to exceed 180 days in order to require exhaustion of such plain, speedy, and affective administrative remedies as are available," exhaustion was only to be required "if the court believe[d] that such a requirement would be appropriate and in the interests of justice." 42 U.S.C. § 1997e(a)(1) (1995). *See Patsy v. Board of Regents*, 457 U.S. 496, 502-07 (1982) (discussing § 1983); *id.* At 508-12 (discussing § 1997e). The PLRA, however, amended § 1997e to require that prisoners seeking to bring such claims first exhaust any available administrative remedies. 42 U.S.C. § 1997e(a). The question before us is whether this new requirement should be applied to cases which were filed, dismissed by the district courts, and appealed to this court before the PLRA was signed into law.

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remedies. Because we hold that the exhaustion requirement does not apply to these cases we need not reach this second issue.

[5]Because Congress did not enact the PLRA until after these cases were pending in this court, the district court had no opportunity even to address the question.

The Supreme Court has determined that, in deciding whether a new statute should be applied to pending cases,

> the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules. When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive affect, *i.e.*, whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, ... it does not govern absent clear congressional intent favoring such a result.

Landgraf v. USI Film Prods., 511 U.S. 244, 280 (1994). Accordingly, we "first look to the statute's text for an expression that the [Act] should, or should not, apply to pending cases." *Lyons*, 105 F.3d at 1065.

A. Textual Analysis

The PLRA amended 42 U.S.C. § 1997e to read, '[n]o action ***shall be brought*** with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a) (emphasis added). We believe that Congress, by its use of the highlighted language, "has expressly prescribed the statute's proper reach." *Landgraf*, 511 U.S. at 280. The statute expressly governs the bringing of new actions, not the disposition of pending cases.

Actions brought before the statute was enacted are not affected by the new administrative exhaustion requirements.

The Seventh Circuit has used similar reasoning to find that another provision of the PLRA does not apply to pending cases. In *Abdul-Wadood v. Nathan*, 91 F.3d 1023 (7th Cir. 1996), that court had to decide whether a case filed before the PLRA's enactment could be dismissed under the new 28 U.S.C. § 1915(g), which states that "[i]n no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if" he has brought three previous frivolous actions or appeals. 28 U.S.C. § 1915(g) (1996). Judge Easterbrook held for the court that the case should not be dismissed because "[s]ection 1915(g) governs bringing new actions or filing new appeals...rather than the disposition of existing cases." 91 F.3d at 1025. Similarly, because § 1997e(a) governs only the bringing of actions, it does not affect pending cases.

Section 802 of the PLRA, which delineates the courts' authority to order prospective relief with respect to prison conditions, lends some additional support to this textual analysis. This section specifically states that the amendment in that section to 18 U.S.C. § 3626 "shall apply with respect to all prospective relief whether such relief was originally granted or approved before, on, or after the date of the enactment of this title." PLRA § 802(b)(1). Plaintiffs argue *expressio unius est exclusio alterius*: that because Congress specified that one part of the PLRA applies to pending actions, it must have intended that the rest of the Act does not. Such an argument would usually not be dispositive by itself. *See Landgraf*, 511 U.S. at 259; *Lyons*, 105 F.3d at 1067. Here, however, the text of the new requirement plainly states that "[n]o action shall be brought" without exhaustion of administrative remedies. Thus, it is likely that had Congress intended the new requirement to pertain to

pending cases it would have employed the same language as it used in § 802(b)(1) to make that intent clear. This strengthens our conclusion that the text of the PLRA indicates that the new administrative exhaustion requirement applies only to cases filed after the Act's passage.

B. Impermissible Retroactive Affect

Even if the language of the statute did not mandate that administrative exhaustion be required only in actions brought after the affective date of the Act, the Supreme Court's decision in *Landgraf* would do so. Footnote 29 of the Court's opinion controlling:

> A new rule concerning the filing of complaints would not govern an action in which the complaint had already been properly filed under the old regime, and the promulgation of a new rule would not require an appellate remand for a new trial.

Landgraf, 511 U.S. at 275 n.29. Although the states suggest that this language could refer only to changes to the technical requirements of filing a complaint, and that the footnote is thus distinguishable from the cases at bar, we will not give the opinion such a narrow reading. The new exhaustion requirement concerns the bringing of actions and, under *Landgraf*, does not affect cases brought before the Act's passage.[6]

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[6]There are other indications, too, in *Landgraf* that a procedural change enacted while a case is pending does not require that steps taken before the enactment be retaken. For example, although "[t]he jury trial right set out in § 102(c)(1) [of the 1991 Civil Rights Act] is plainly a procedural change of the sort that would ordinarily govern in trials conducted after its affective date," "the

The states argue that because footnote 29 is dictum it is not binding on this court. *Cf. Covino v. Reopel*, 89 F.3d 105, 108 (2d Cir. 1996) (dismissing footnote 29 as distinguishable dictum). We believe this footnote is instructive of the Supreme Court's views and cannot be dismissed out of hand. If anything, this particular "dictum," which eight Justices endorsed, carries more weight than much of the *Landgraf* analysis, which commanded a bare majority. *See Landgraf*, 511 U.S. at 290-92 (Scalia, J., concurring in judgment). Where there is no clear precedent to the contrary, we will not simply ignore the Court's dicta. *See Jordan v. Gilligan*, 500 F.2d 701, 707 (6th Cir. 1974) ("Even the [Supreme] Court's dicta is of persuasive precedential value.").

The states argue that there is, in fact, contrary Supreme Court precedent: *Cort v. Ash*, 422 U.S. 66 (1975), in which the plaintiff sought to enjoin a corporation from including partisan political literature with its dividend checks, and *Weinberger v. Salfi*, 422 U.S. 749 (1975), which involved a challenge to Social Security eligibility requirements. Neither case is apposite. *Cort* involved two of the situations, inapplicable here, in which, under *Landgraf*, a court should "apply the law in affect at the time it renders its decision." *Landgraf*, 511 U.S. at 273 (quoting *Bradley v. School Bd. of Richmond*, 416 U.S. 696, 711

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promulgation of a new jury trial rule would ordinarily not warrant retrial of cases that had previously been tried to a judge." *Landgraf*, 511 U.S. at 280, 281 n.34. *See* NORMAN J. SINGER, 2 SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 41.04 at p. 351 (5th ed. 1992) ("It has been held that there is a presumption that procedural statutes apply retroactively. But steps already taken, including pleadings, and all things done under the old law continue affective, unless an intent to the contrary is plainly manifested.") (footnote omitted).

(1974)). First, *Cort* differs from the cases at bar in that Ash was seeking to enjoin the defendants from future misconduct. *Cort*, 422 U.S. at 71, 74. "*In that circumstance*, a statute enacted after the decision of the Court of Appeals requires reversal of the holding of the Court of Appeals." *Id.* at 74. (citation omitted) (emphasis added). *See id.* at 77 ("[N]or is there any possible 'manifest injustice' in requiring respondent to pursue *with respect to alleged violations which have yet to occur* the statutory remedy for *injunctive relief* created by the [intervening] Amendments.") (emphasis added). Under *Landgraf*, applying a new statute to pending cases is proper where plaintiff seeks only future injunctive relief. *Landgraf*, 511 U.S. at 273-74.[7]

Second, the intervening statute[8] in *Cort* "expressly vest[ed] the [Election] Commission with 'primary jurisdiction' over any claimed violation of [the relevant election law] within its purview." *Cort*, 422 U.S. at 75-76. Under *Landgraf*, "intervening statutes conferring or ousting

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[7]The dissent's attempt to bring the cases at bar within the holding of *Cort* on the grounds that any relief granted will necessarily take place in the future is meaningless: because we cannot reverse time, of course any award of damages will occur in the future, just as it would have in *Landgraf*. Under the dissent's theory, a court could punish someone for conduct that was made criminal only after he had done it, because the punishment would take place in the future.

[8]The new statute established the Federal Election Commission to "administer, seek to obtain compliance with, and formulate policy with respect to [the] Act and [related sections of the criminal code]. The Commission has primary jurisdiction with respect to the civil enforcement of such provisions." Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263, 1280-81 (codified at 2 U.S.C. § 437c(a)(1), (b) (1975)).

jurisdiction" will regularly be applied to pending cases because "jurisdictional statutes 'speak to the power of the court rather than to the rights or obligations of the parties,'" *Landgraf*, 511 U.S. at 274 (quoting *Republic Nat. Bank of Miami v. United States*, 506 U.S. 80, 100 (1992) (Thomas, J., concurring)). *See Lyons*, 105 F.3d at 1075. The statute in *Cort* contained a specific grant of jurisdiction to the Commission which, the Court held, served at the same time to divest the federal courts of jurisdiction over such cases. *Cort*, 422 U.S. at 75-76 & n.9. Section 1997e(a), in contrast, addresses a party's right to bring suit in court and does not speak in terms of jurisdiction or the power of the court: it is merely an exhaustion requirement. *See Castille v. Peoples*, 489 U.S. 346, 349 (1989) ('Codified since 1948 in 28 U.S.C. § 2254, [9] the [habeas corpus] exhaustion rule, while *not a jurisdictional requirement*, creates a 'strong presumption in favor of requiring the prisoner to pursue his available state remedies.'") (citing 28 U.S.C. § 2254 and quoting *Granberry v. Greer*, 481 U.S. 129, 131 (1987)) (emphasis added); *McCarthy v. Madigan*, 503 U.S. 140, 144 (1992) ("The doctrine of exhaustion of administrative remedies is one among related doctrines--including abstention, finality, and ripeness--that govern the *timing* of

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[9]28 U.S.C. § 2254(b) (1989) stated:

> An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless is appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

federal court decision making.") (emphasis added).[10]

Cort, then, does not suggest that the exhaustion requirement should apply to these pending cases. *Landgraf* specifically cites *Cort* as involving "application of [an] intervening statute transferring to [an] administrative agency *jurisdiction* over [a] *claim for injunctive relief.*" *Landgraf*, 511 U.S. at 279 n.33. In the cases before us, where plaintiffs seek monetary damages and the intervening statute does not purport to oust district court jurisdiction, *Cort* is inapposite.

The states next argue that the new administrative exhaustion requirement is jurisdictional under *Weinberger v. Salfi*, 422 U.S. 749 (1975), and should thus govern pending cases.[11] The essence of their argument is that *Salfi* held that a statute that involved agency exhaustion and contained seemingly prospective language was jurisdictional, and therefore that § 1997e(a) must also be jurisdictional. The *Salfi* opinion makes plain, however, the difference between the statute involved there and the one now before us. In *Salfi*, the Court held that it was clear that the relevant statute[12] was "more than a codified requirement of

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[10]We need not decide whether these statements in *Peoples* and *McCarthy* mean that district courts can exercise jurisdiction over unexhausted prisoners' claims filed after the PLRA's enactment. We hold only that the new administrative exhaustion requirement of § 1997e does not oust preexisting jurisdiction.

[11]*Salfi* did not involve any question of whether an interceding statute should apply to pending cases.

[12]The Court quotes the statute, 42 U.S.C. § 405(h) (1974), in relevant part: "No action against the United States, the Secretary, or any officer of employee thereof shall be brought under [§ 1331 *et seq.*] of Title 28 to recover on any claim arising under [Title II

administrative exhaustion" on the grounds that the statute's "own language" was "sweeping and direct and [ ] state[d] that no action shall be brought under [28 U.S.C.] § 1331, not merely that only those actions shall be brought in which administrative remedies have been exhausted." *Salfi*, 422 U.S. at 757. *See id.* at 756-57 (On its face, this provision bars district court federal-question jurisdiction over suits, such as this one, which seek to recover Social Security benefits. Yet it was § 1331 jurisdiction which appellees successfully invoked in the District Court.") Section 1997e(a), in contrast, contains neither the sweeping and direct language of § 405(h) nor that statute's explicit bar to district court jurisdiction. It, rather, indicates "merely that only those actions shall be brought in which administrative remedies have been exhausted." *Salfi*, 422 U.S. at 757.

Because neither *Cort* nor *Salfi* requires a contrary result, we believe that even if the prospective statutory language were not dispositive in this case, footnote 29 of *Landgraf* would require that the new administrative exhaustion provision not apply to pending cases.[13]

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of the Social Security Act]." *Salfi*, 422 U.S. at 756 (alterations in original).

[13]There is certainly nothing in the text of the PLRA to indicate "clear congressional intent" that the administrative exhaustion requirement should be given retroactive affect. *See Landgraf*, 511 U.S. at 280.

The dissent's reliance on a short quote from Chief Justice Marshall's opinion in *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801), therefore seems particularly strange. The new law at issue in that case (a treaty) explicitly applied to property that was not "definitively condemned" when the treaty was signed, *id.* at 108; the holding rested on that language, rather than on any broad principle of applying intervening laws. *See id.*

C. Policy Considerations

The states and the plaintiffs argue at great length that applying, or refusing to apply, respectively, this new provision to pending cases would be good policy or would better serve the purposes of the new law. Such considerations do not figure in the *Landgraf* analysis. *See Landgraf*, 511 U.S. at 285-86 ("it will frequently be true...that retroactive application of a new statute would vindicate its purposes more fully. That consideration, however, is not sufficient to rebut the presumption against retroactivity... A legislator who supported a prospective statute might reasonably oppose retroactive application of the same statute."). Moreover, it is not at all clear in this case which side has the better of the policy argument.

The Supreme Court has called "protecting administrative agency authority and promoting judicial efficiency" the "twin purposes" of exhaustion requirements. *McCarthy v. Madigan*, 503 U.S. 140, 145 (1992). Sending these plaintiffs back to exhaust their administrative remedies would, of course, lighten this court's docket, at least temporarily.[14] *See id.* (judicial efficiency includes avoiding unnecessary judicial controversy and piecemeal appeals). However, "policy considerations alone cannot justify judicially imposed exhaustion unless exhaustion is consistent with congressional intent." *Patsy v. Board of Regents*, 457

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at 110. *See also Landgraf*, 511 U.S. at 273 ("Our application of 'the law in affect' at the time of our decision in *Schooner Peggy* was simply a response to the language of the statute.").

[14]We might, however, find some of these cases before this court again in another two years, after plaintiffs have exhausted their administrative remedies and then gone through district court for a second time.

U.S. 496, 513 (1982). Because Congress did not intend that all prisoners who filed suit before the act took affect be required to exhaust administrative remedies, we could not impose such a requirement even if we though it wise policy.

In addition, although administrative exhaustion in the usual case "may produce a useful record for subsequent judicial consideration," *McCarthy*, 503 U.S. at 145, the facts in these cases are already stale. Administrative findings might still be useful to a reviewing court, but administrative fact finding in these old cases would not have the same promptness advantage over judicial fact finding that would exist where the administrative procedure occurred soon after the alleged violation.

Other policy considerations counsel against applying the new exhaustion requirement to pending cases. The sheer volume of prisoner civil rights cases makes it difficult for the federal courts to take the time that is often necessary to distinguish between the frivolous and the meritorious suits. That inmates are forced to file nearly all of these cases pro se, and can rarely conduct any sort of factual investigation, only compounds this problem. To the extent, then, that applying the new administrative exhaustion requirement to pending cases would allow the courts more time to examine the merits of each case, or would provide a way to separate the meritorious from the meritless cases, to do so would be good policy. Conversely, we would hesitate to do this if we thought it would aggravate these problems.

The majority of the prisoner's rights cases pending before this court were dismissed below; if past experience is any indication, to dismiss the cases and allow the prisoners to refile after they have exhausted their administrative remedies, or to retain jurisdiction over the cases while the inmates exhaust those remedies, will not reduce the district

courts' dockets or workloads. To the contrary, the district courts would then have to reexamine these same cases, supplemented with new records from the administrative proceedings, sometime in the future. Although a district court that had erroneously previously dismissed a particular case might conceivably make a different determination based on the new administrative record, if an inmate had thought that going through the administrative process would help his case, he could have filed an administrative complaint in the first place under the old law. And if the district court had thought that administrative consideration would have been "appropriate and in the interests of justice," and that the available grievance procedure was "fair and affective," the district judge could have continued the case for up to 180 days and ordered administrative exhaustion in the first place. 42 U.S.C. § 1997e(a) (1995).[15] Furthermore, there is no indication that any plaintiffs with pending cases want to be required, or even allowed, to go back and exhaust state administrative procedures. In this regard, then, we believe it is better policy to apply the old law to these pending cases and address them now, rather than recycling them through the system and perhaps perpetuating the problems that the old law engendered. We emphasize that we do not believe that it is our job to weigh policy--that is Congress's job. We address these policy arguments simply because the parties spent so much time doing so.

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[15]The pre-PLRA § 1997e(a) places no temporal restrictions on a district court's authority to order this exhaustion. The dissent's suggestion that our decision today somehow denies district courts the benefits of an administrative record is therefore somewhat mysterious: any district court that believes that such a record would be useful in a case governed by the old law may require administrative exhaustion.

In the end, even if it were proper for us to use policy arguments to supersede congressional intent and apply the new law to these pending cases, it is unclear which outcome is the better policy.

Sending these cases back for administrative exhaustion would also cause unnecessary jurisprudential questions in the future. The events giving rise to these cases occurred several years ago; in some, the statute of limitations has expired. Although all four of the states' representatives stated at oral argument that they would waive any applicable time limits on filing administrative claims, none of the assistant attorneys general present could assure us that they had the authority to extend the applicable statutes of limitations. Were we to apply the new law to these cases, it is not completely certain that we could toll the statutes of limitations. *Compare Board of Regents v. Tomanio*, 446 U.S. 478, 490-91 (1980) ("Unless [a federal remedy] is structured to require previous resort to state proceedings, so that the claim may not even be maintained in federal court unless such resort be had, it cannot be assumed that Congress wishes to hold open the independent federal remedy during any period of time necessary to pursue alternative state-court remedies.") (citation omitted), *with Patsy*, 457 U.S. at 514 n.17 ("Unless the doctrine that statutes of limitations are not tolled pending exhaustion were overruled, *see* [*Tomanio*], a judicially imposed exhaustion requirement might result in the affective repeal of § 1983."). Finally, the states have not pointed to anything to distinguish the cases before us, where the inmates lost at the district court level, from cases pending in this court in which the plaintiffs were victorious below. Requiring successful plaintiffs to relitigate their grievances would have impermissible retroactive affect under *Landgraf*. *See Landgraf*, 511 U.S. at 280 (statute will have retroactive affect if it "impose[s] new duties with respect to transactions already completed"). It may well be that the courts could

develop doctrines and remedies to solve these potential problems. However, we should not invite unnecessary problems upon the courts and simply hope that we might be able to remedy them in the future.[16]

These considerations lend further support to our conclusion: where the language of the statute and *Landgraf* both require that we apply this new requirement only with respect to cases filed after the PLRA's passage, it would be improper to hold, on policy grounds, that the provision applies to the cases before us. *Cf. Patsy*, 457 U.S. at 514 ("These and similar questions might be answered swiftly and surely by legislation, but would create costly, remedy-delaying, and court-burdening litigation if answered incrementally by the judiciary in the context of diverse constitutional claims relating to thousands of different state agencies.").

IV. CONCLUSION

Because the language of 42 U.S.C. § 1997e(a) is explicitly prospective and there is no reason to think that Congress intended a retroactive affect, we will not apply the new administrative exhaustion requirement to these cases where appeals were pending in this court on April 26, 1996, the day PLRA was enacted. These four cases are properly before this court, and can be decided without undertaking

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[16]Congress passed the PLRA in large part to change the manner in which the federal courts handle prison civil rights actions. Had Congress intended that the Act have the drastic affect of throwing out of court litigants with pending appeals, and of requiring that federal courts toll state statutes of limitations so that pending cases can be held in abeyance or refiled after administrative exhaustion, surely it would have given some indication of this intent.

administrative exhaustion. We address the merits of these four cases in separate opinions.

MERRITT, Circuit Judge, dissenting. Does the new "prisoner civil rights" statute, the Prison Litigation Reform Act of 1996, 42 U.S.C. § 1997e, apply to pending cases? That is the question before us. Passed in April 1996, the statute is jurisdictional in nature. It requires the exhaustion of all "available" state "administrative remedies" by the prisoner before a federal court may entertain and decide his civil rights action. Prior to the enactment of the new statute, no significant incentives existed to deter the filing of state prison petitions raising insubstantial issues, and so in federal courts each year prisoners file thousands of petitions and take thousands of appeals. More than 1,000 such appeals are filed in the Sixth Circuit Court of Appeals each year, and approximately 500 are now pending.

The opinion of the Court that the statute does not apply to pending cases fails even to mention the extensive benefits of the new statute or to acknowledge that those benefits apply just as much to pending cases as to new cases. This narrow interpretation of what could be an extremely useful law deprives prisoners, state corrections systems, state prosecutors and courts of an opportunity to overcome some of the problems with prisoner petitions now flooding the federal courts--almost all of which are denied without a hearing in the trial or appellate courts.

A system deferring federal court review until completion of the state process of administrative adjudication and judicial review of the administrative decision (if provided by state law) has long been needed. No persuasive reason has ever been given for requiring full exhaustion of state remedies in habeas corpus cases involving life or liberty but allowing direct access in prison rights cases under § 1983.

The new statute is therefore, a much needed reform with substantial benefits.

The reasons for requiring exhaustion in such cases are similar to the reasons for requiring exhaustion of available remedies in state habeas corpus cases involving good-time credits and similar prison regulations, as explained by Justice Stewart in *Preiser v. Rodriguez*, 411 U.S. 475, 491-92, 498 (1973). "It is difficult to imagine," he wrote, "an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations, and procedures, that the administration of its prisons":

> The relationship of State prisoners and the State officers who supervise their confinement is far more intimate than that of a state and a private citizen...Since these internal problems of state prisons involve issues so peculiarly within state authority and expertise, the States have an important interest in not being bypassed in the correction of those problems. Moreover, because most potential litigation involving state prisoners arises on a day to day basis, it is most efficiently and properly handled by the state administrative bodies and state courts, which are, for the most part, familiar with the grievances of state prisoners and in a better physical and practical position to deal with those grievances.
>
> ...
>
> [The exhaustion requirement] services the important function of allowing the State to deal with these peculiarly local problems on its own while preserving for the state prisoner

> an expeditious federal forum for the vindication of his federally protected rights, it the State has denied redress.

Each of the four states in the Sixth Circuit, Tennessee, Kentucky, Ohio and Michigan, has recently established a prison grievance process for resolving disputes that is certified by the Department of Justice as meeting its criteria for a rational, fair and efficient system of conducting evidentiary hearings and deciding prison disputes. Such deliberative proceedings, based on evidence, a written record and concluding in a written decision subject to review, will give prison wardens, state correction officials, state executive, judicial and legislative leaders, and the public much needed information about the operation of the prison system. The prisoner will have an opportunity to complain, present evidence personally and have others testify before a neutral tribunal familiar with local prison conditions. Legitimate grievances can be worked out and adjusted at the local administrative and review level before coming to federal court, as currently takes place in criminal cases during the habeas corpus process.

This weeding-out process will tend to reduce the number of such cases that reach the federal courts, as in habeas cases, and improve the quality of the decision making process. The federal courts will have a written record. They will be able to determine whether a constitutional violation has occurred in a more reflective and reliable way without the present bureaucratic necessity of delegating the work in plenary fashion to pro se law clerks at the district court level and to staff attorneys at the appellate level.

In the *Thaddeus-X* case alone, Judge Moore's opinion on the merits of the summary judgment issue runs to 12,000 words and interprets nearly 100 different court opinions and

orders a new trial in the court below that will require many days, perhaps weeks, of evidence from inmates and prison employees. *Thaddeus-X*, by itself, illustrates the reasons we should require administrative exhaustion and an administrative record before deciding the multiple, confusing, shotgun-type claims filed against the many state defendants in the case.

My colleagues' opinion avoids any serious consideration of beneficial purposes of the new statute or the policies underlying it. "We emphasize," Judge Moore says, "that we do not believe that it is our job to weight policy--that is Congress's job." The opinion simply repeats several times in different ways the view that the pending cases will simply come back "before this court again in another two years, after plaintiffs have exhausted their administrative remedies and then gone through the district court for a second time." As a district judge, I would prefer a few cases coming back with an administrative record to the *Thaddeus-X* type result.

Ironically, this prediction that all of the cases will come back in two years is inconsistent with Judge Moore's stated view that the statute of limitations will probably have run when the cases come back to court. The purpose of the new statute is simply to defer a decision pending exhaustion of remedies, and the running of the statute of limitations would be tolled or suspended during the period of exhaustion, as is uniformly the case in all such administrative cases. This is not a valid argument against applying the new jurisdictional statute to pending cases.

Judge Moore's opinion on the issue of applying the statute to pending cases consists mainly of citing short excerpts from selected Supreme Court opinions to reach the chosen result--a familiar exercise in contemporary legal

argumentation. The opinion ignores the broad purposes of the new statute and the fact that Congress, in employing the doctrine of exhaustion of remedies, has decided to use the habeas corpus model of exhaustion. Even if we use this limited rationale, however, a different conclusion is required. This rationale does not give the language of the new statute and the Supreme Court authorities their most plausible interpretation.

First, the statutory language, "no action shall be brought" until all available remedies are "exhausted," should be interpreted to mean what is obviously intended--that a federal court should not "decide" the merits of any such action prematurely. Contrary to the interpretation given by Judge Moore, it is obvious that Congress did not literally mean to bar a prisoner from "filing" a complaint in court. The only interpretation of the language that makes sense is that a federal court will not adjudicate the claim until after exhaustion. That is the purpose of the statute--nonadjudication of unexhausted claims--and it logically applies just as much to pending cases as to any other cases. The activity that the new statute contemplates should now occur--state adjudication of the claim--has not taken place in these cases, and the Court should not now adjudicate either a new or pending case without it.

Second, the language in *Landgraf v. USI Film*, 511 U.S. 244 (1994) and *Court v. Ash*, 422 U.S. 66 (1975), that Judge Moore cites to reach the chosen result actually supports the opposite conclusion. In the *Court* case, Congress had recently enacted a new statute setting up the Federal Election Commission and creating for the first time a set of election law administrative remedies. In 1972, plaintiff had filed an action for damages and injunctive relief against Bethlehem Steel and its officials for making illegal corporate contributions to a presidential campaign, and the

Court of Appeals had upheld the plaintiff's claim. The new exhaustion of remedies law was enacted after the Court of Appeals ruling. Justice Brennan, writing for a unanimous court, held that the exhaustion of remedies provision of the new statute must be applied to pending cases where the relief, if any, will take place in the future. In the cases now before us, as in *Court*, no relief has been granted and all relief, if any should be granted in either a judicial or prison administrative proceeding, must take place in the future. *Court* is specifically cited with approval in footnote 33 of *Landgraf v. USI Films*, and our Court should have followed its holding in the instant case.

Third, in quoting snippets of Supreme Court language, the lead opinion fails to recognize the significance of language from *Landgraf* relying on Chief Justice Marshall's opinion in *United States v. Schooner Peggy*, 5 U.S. 64 (1 Cranch 103) (1801). For almost two centuries, the Supreme Court observes, "we have recognized that, in may situations, a court should 'apply the law in affect at the time it renders its decisions...even though the law was enacted after the events that gave rise to the suit.'" The Supreme Court then gives as example of this doctrine a number of cases holding that intervening statutes modifying jurisdiction should be applied to pending cases because "application of a new jurisdictional rule usually 'takes away no substantive right but simply changes the tribunal that is to hear the case'" (case citation omitted). In the instant case, our Court fails to recognize that the new statute now before us simply modifies our jurisdiction in § 1983 prisoner cases by requiring exhaustion of remedies. In *Landgraf*, the Supreme Court also says changes in procedural rules usually apply to pending cases "because rules of procedure regulate secondary rather than primary conduct." In the instant case the Court again fails to recognize that this new statute changes no "primary" or substantive right but only

"secondary" rights governing the tribunal that will first conduct a hearing, make a record and resolve the dispute.

My conclusion is therefore that the purpose and policy underlying the new statute providing for exhaustion of state administrative remedies in prisoner 1983 cases leads to the application of the new statute to pending cases and that the case law since Chief Justice Marshall's time leads to the same conclusion. Applying the new statute to pending cases will not upset settled expectations or vested rights of any kind. All legitimate interests are served by such a rule--the prisoner with a valid grievance, the states which have created a fair process for adjudicating such claims and the federal courts which are now assigning such cases to pro se law clerks and staff attorneys because we are unable to cope with the volume of such cases or treat them in the same way that we treat regular federal question and diversity cases. The rule created by my colleagues declining to apply a current jurisdictional statute to pending cases is not sensible because it does not serve the interest of any party or the public and does not observe the longstanding values of federalism requiring a due respect for state institutional arrangements. And it certainly does not serve the cause of judicial economy. For these reasons, I do not believe we should exercise jurisdiction in these cases but should remand with instructions to dismiss without prejudice so that the parties can exhaust their administrative remedies under the Prison Litigation Reform Act of 1996.